UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

State of COLORADO, **-against-** The UNITED STATES OF AMERICA	**Case No.** 2:23-CV-0020/QWT Qwerty, USDJ

ORDER AND OPINION ON PLAINTIFF'S MOTION TO EXPEDITE DEFENDANT'S RESPONSE TIME

SAMSCHULPEN2, United States Assistant Attorney General appeared for the defendant-movant.

MAXONYMOUS, Assistant State Attorney, and TOXICOUST, Colorado Attorney General, appeared for the State of Colorado (nonmovant).

Background

The Court is today seised of an action brought by the State of Colorado ("the State") against the United States of America ("the Federal Government"). The Court was informed of the movant's waiver of process on the 14th August 2023, and the motion to dismiss of which we dispose today was filed within the converted 60-day response period stipulated under Fed. R. Civ. P. 12(a)(1), on the 20th August 2023. See *Artist v. Rubio*, No. 23/01 2:23-CV-0014/QWT (D. Colo. 9th August 2023)[1]. In its civil complaint, the nonmovant alleges that a Congressional (Federal) enactment, the "Dresden Road Ownership Act" ("the impugned Act"), purportedly "steals ownership of a state road" Pl. Civ. Complaint, at 1. Plaintiff alleges that the impugned Act does not fall under any of the heads of Federal legislative authority for it is neither an interstate road, nor, the State argues, is it otherwise

[1] https://archive.org/details/2_23-cv-0014_QWT-order-mot-to-expedite-response/mode/2up

justified under the "Sweeping" or "Necessary and Proper" Clause, U.S. Const. art. I § 8 cl. 18. The movants did not respond on any of the substantive points raised by the nonmovant, and allege that the "plaintiff fails to state a claim upon which relief can be granted".

Discussion

We are presented today with a motion made under Fed. R. Civ. P. 12(b)(6), namely a motion to dismiss for failure to state a claim. Firstly, we must remember that unlike some of its neighbours in Rule 12(b), dismissal for failure to state a claim operates as a judgment on the merits, *cf. Muscogee Nation v. Pruitt*, 669 F.3d 1159, 1167-68 (10th Cir. 2012), *Deloge v. Davis*, No. 21-8025, at *4 (10th Cir. Dec. 30, 2021), quoting *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 399 n.3 (1981). As such, if granted, at least in this Circuit, such dismissals "are presumptively with prejudice because they fully dispose of the case." *Stan Lee Media, Inc. v. Walt Disney Co.*, 774 F.3d 1292, 1299 (10th Cir. 2014). As a general rule, "[a] motion to dismiss for failure to state a claim "is viewed with disfavor, and is rarely granted."" *Lone Star Industries, v. Horman Family Trust*, 960 F.2d 917, 920 (10th Cir. 1992), quoting in part *Sosa v. Coleman*, 646 F.2d 991, 993 (5th Cir. 1981), and accordingly our Circuit has repeatedly stated that such a motion will be granted "only where it is obvious that the plaintiff cannot prevail on the facts he has alleged and it would be futile to give him an opportunity to amend." *Webb v. Caldwell*, 640 F. App'x 800, 802 (10th Cir. 2016). See also *Adams v. C3 Pipeline Constr.*, 30 F.4th 943, 972 (10th Cir. 2021) ("The futility question is functionally equivalent to the question whether a complaint may be dismissed for failure to state a claim"), *Gaines v. Stenseng*, 292 F.3d 1222, 1224 (10th Cir. 2002). In a similar vein, when "ruling on a motion to dismiss for failure to state a claim, [a]ll well-pleaded facts [...] must be taken as true, and the court

must liberally construe the pleadings and make all reasonable inferences in favor of the non-moving party." *Rajala v. Spencer Fane LLP (In re Generation Res. Holding)*, 964 F.3d 958, 965 (10th Cir. 2020), quoting *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.* , 861 F.3d 1081, 1105 (10th Cir. 2017) (alteration in original) (internal quotation marks omitted), for refusing to make such assumptions inherently prevents us from correctly "restrict[ing] [ourselves] to looking at the complaint" *Casanova v. Ulibarri*, 595 F.3d 1120, 1125 (10th Cir. 2010), and nothing else, making our disposition "irregular" *Id.*, but in doing so we must not of course confuse those facts what are merely "conclusory allegations" *Reznik v. inContact, Inc.*, 18 F.4th 1257, 1260 (10th Cir. 2021). Our circuit has explained that a statement is of this latter nature where it "states an inference without stating underlying facts or is devoid of any factual enhancement" *Brooks v. Mentor Worldwide LLC*, 985 F.3d 1272, 1281 (10th Cir. 2021) – this bar is not excessively high, since "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we `presume that general allegations embrace those specific facts that are necessary to support the claim.'" *United States v. Colorado Supreme Court*, 87 F.3d 1161, 1165 (10th Cir. 1996). Instead, a claim is sufficiently "plausible" to survive a motion to dismiss when the pleaded content "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Jordan-Arapahoe v. B.O.C. Cty of Arapahoe*, 633 F.3d 1022, 1025 (10th Cir. 2011). At heart, "what the rules of notice pleading call for is a complaint alleging enough facts to raise a reasonable expectation that discovery will reveal evidence that a constitutional violation has in fact occurred." *Matthews v. Bergdorf*, 889 F.3d 1136, 1149 (10th Cir. 2018).

When considering whether or not a plausible claim has been stated, we must firstly establish whether or not the purported effect of the impugned Act is a conclusory statement or an alleged fact and thereafter if those facts are sufficiently pleaded. Indeed it is not particularly helpful, as counsel before the court will be well aware, that "what the precise line is between a conclusory allegation and a factual allegation" § 1357 Motions to Dismiss—Practice Under Rule 12(b)(6), 5B Fed. Prac. & Proc. Civ. § 1357 (3d ed.) is somewhat unclear. Whilst our "common-sense" *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) assessment of the pleadings leads us to conclude that our treatment of this question is fundamentally essential to the outcome of the action, we decline to perceive the need to notify the parties of our intent to convert the motion (as we would be required to do were such a conversion contemplated, see *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 654 (10th Cir. 2002)) to one for summary judgment as it is equally clear to us that whatever categorisation is assigned to it, the impugned Act is "central to the plaintiff's claim" *N. Mill St., LLC v. City of Aspen*, 6 F.4th 1216, 1232 (10th Cir. 2021), and, we understand from the pleadings of the movant, including the very motion we dispose of today, which actively refers to and justifies the lawful character of the impugned Act, "undisputed as to their accuracy and authenticity" *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1104 (10th Cir. 2017). See also *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 127 S. Ct. 2499, 2509, 168 L. Ed. 2d 179 (2007), citing 5B Wright & Miller § 1357 (3d ed.) ("when deciding a Federal Rule 12(b)(6) motion to dismiss, courts may consider matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items

appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned"). We note lastly that a motion for dismissal under rule 12 (b)(6) does not set a particularly high bar for survival, since its determinative objectives are`"to ensure that a defendant is placed on notice of his or her alleged misconduct sufficient to prepare an appropriate defense," and "to avoid ginning up the costly machinery associated with our civil discovery regime on the basis of 'a largely groundless claim"` *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1215 (10th Cir. 2011), quoting in part *Pace v. Swerdlow*, 519 F.3d 1067, 1076 (10th Cir.2008) (Gorsuch, J., concurring). Accordingly, we need not perceive the need to explore the merits of the legal theory by which the plaintiff seeks to assert his right to relief, but merely whether or not the facts he plead sufficiently allege some potential wrong – in fact a plaintiff need not "perfectly invoke the correct legal theory" 5B Wright & Miller § 1357 (3d ed.). Whilst without even the most summary of inquiry it would be wholly improper of the court to purport to grant judgment on the merits we may nevertheless surmise that in its operative provisions, the impugned Act provides that:

(a) The United States Department of Defense shall, upon the passage of this act, take immediate ownership of the stretch of Dresden Road from the easternmost checkpoint to the westernmost checkpoint of the Colorado National Guard Base.

(b) The United States Department of Defense shall, if it so chooses, exercise the authority to close Dresden Road and enforce 18 U.S. Code § 1382 to any civilian traffic not associated with the United States Federal Government.

Whilst the court acknowledges wholly that the plaintiff's arguments may or may not be sufficient at law with respect to his entitlement to relief we are however satisfied that the plaintiff pleads sufficient facts to give rise, under some actual or proposed nonfrivolous legal theory to relief at law.

Conclusion and Order

Having regard to the above, the Court ORDERS as follows;

1. That the motion to dismiss is **denied**.

It is so ORDERED,

25th September 2023

/s/NewPlayerqwerty

USDJ